

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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Docket No. 163,029

ORDER

Claimant and the Kansas Workers Compensation Fund both appealed from an Award entered by Administrative Law Judge James R. Ward on May 24, 1994.

APPEARANCES

Claimant appeared by and through his attorney, Mark S. Gunnison of Kansas City, Missouri. Respondent and its insurance carrier appeared by and through their attorney, Larry R. Mears of Atchison, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, J. Paul Maurin of Kansas City, Kansas.

RECORD & STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant seeks benefits for pulmonary disease pursuant to the occupational disease provisions of the Kansas Workers Compensation Act. See K.S.A. 44-5a01. On appeal claimant contends that the Administrative Law Judge erred in finding that claimant is entitled to benefits for fifty percent (50%) of his established disability on the basis of an apportionment of fifty percent (50%) of his disability to nonwork related factors. The Kansas Workers Compensation Fund argues that the Administrative Law Judge erred in awarding one-hundred percent (100%) of the award to be paid by the Kansas Workers Compensation Fund. The finding regarding nature and extent of claimant's disability is not disputed and the Appeals Board adopts the finding that claimant is permanently and totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

At the time this claim was filed, claimant had worked in the foundry for approximately thirty-seven (37) years. He began working for Rockwell International in 1955 and continued to work in the same foundry when Rockwell International was sold to respondent, Atchison Casting Corporation. Claimant worked as a core maker, placing sand in a box which is then rammed and vented before the box is drawn off. Claimant developed, and was diagnosed by Dr. Kerby, as having an obstructive lung disease as early as 1985. He continued thereafter to work for respondent and the lung condition developed to the point that he suffered brain damage from low oxygen levels.

Dr. Kerby, one of the treating physicians, testified that in his opinion approximately fifty percent (50%) of claimant's current condition is work related and fifty percent (50%) is caused by other factors, including pre-existing asthma and smoking. Dr. Kerby's apportionment between occupational and non-occupational factors is the only evidence in the record on this issue and was followed by the Administrative Law Judge in entering his Award. Claimant contends, however, that the Administrative Law Judge erred in construing K.S.A. 44-5a01(d). The portion of the statute in question reads:

"Where an occupational disease is aggravated by any disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death, as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants."

Claimant argues that the above-quoted statutory language requires a distinction be made between the disability and the disease. In this case the only evidence of apportionment relates to the disease, not the disability. Apportionment of causes for the disease is, according to claimant, different from apportionment of the causes of the disability. The Appeals Board disagrees with claimant's argument. In this case the disease and disability are conterminous. Apportionment of the causes of the disease is the same as apportionment of the disability. The apportionment made by the Administrative Law Judge is supported by the only evidence in the record on the issue and the Appeals Board agrees with that apportionment.

As claimant's counsel points out, the statute apportioning benefits does not refer to medical benefits. The Appeals Board, therefore, finds that all medical benefits, including future benefits, should be the responsibility of respondent or, in this case, the Workers Compensation Fund. The Appeals Board approves and affirms the Award of future medical benefits without need for further application with Dr. Ellis R. Berkowitz.

The Appeals Board also agrees with the finding by the Administrative Law Judge that one-hundred percent (100%) of the disability benefits awarded should be paid for by the Kansas Workers Compensation Fund. As indicated in the Award, it is clear that as of 1985 claimant suffered from a handicap. Respondent knew claimant had a breathing problem but retained claimant as an employee thereafter. The medical evidence, specifically the testimony of Dr. Kerby, establishes that the subsequent disability would not have occurred but for the pre-existing impairment. One-hundred percent (100%) of the Award should be paid by the Kansas Workers Compensation Fund. See K.S.A. 44-567

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward, dated May 24, 1994, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE in favor of claimant, Dennis R. Garrett, and against the respondent, Atchison Casting Corporation, self-insured, for a combination of temporary total and permanent total disability compensation, at the rate of \$289.00 per week, limited to 50% of the employer's maximum liability under K.S.A. 44-510f(a)(1), amounting to \$62,500.00.

As of March 31, 1995, there would be due and owing to claimant 165.86 weeks of compensation, at the rate of \$289.00 per week, in the sum of \$47,933.54, payable in one lump sum, less the compensation heretofore paid. Thereafter, the balance of compensation, in the amount of \$14,566.46, is payable at the rate of \$289.00 per week, for 50.40 weeks, unless otherwise ordered.

Further award is made that the Workers Compensation Fund reimburse the respondent 100% of all disability compensation and medical benefits expended herein and assume 100% of the costs of all benefits awarded herein, including temporary total, permanent total and medical expenses.

Further award is made that claimant is entitled to future medical to be paid by the Kansas Workers Compensation Fund without the need for further application therefore with Dr. Ellis R. Berkowitz.

Claimant's attorney is granted a lien against the proceeds of this award for not more than 22.5% of the amount recovered in accordance with the contract dated February 24, 1992, which is hereby approved.

Reporter fees are assessed as costs to the Workers Compensation Fund to be paid direct as follows:

Appino & Achten Reporting Service	\$768.05
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(exclusive of the cost of the Deposition of Ellis R. Berkowitz,
M.D., the amount of which is unknown)

Correll Reporting Service	\$260.50
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Curtis, Schloetzer, Hedberg, Foster
& Associates

\$291.40

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark S. Gunnison, Overland Park, KS
Larry R. Mears, Atchison, KS
J. Paul Maurin, Kansas City, KS
James R. Ward, Administrative Law Judge
George Gomez, Director